

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

SEP 24 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2008-0008-PR
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
ELTORNA GANT, SR.,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR2000-027076

Honorable James H. Keppel, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Law Offices of Thomas Jacobs  
By Thomas Jacobs

Tucson  
Attorney for Petitioner

P E L A N D E R, Chief Judge.

¶1 Petitioner Eltorna Gant, Sr. challenges the trial court's order dismissing without an evidentiary hearing his petition for post-conviction relief in which he raised claims of ineffective assistance of trial counsel and jury misconduct. Absent an abuse of

discretion, we will not disturb the court's ruling. *State v. Taylor*, 216 Ariz. 327, ¶ 12, 166 P.3d 118, 122 (App. 2007).

¶2 Gant was convicted of first-degree murder and two counts of attempted first-degree murder. The murder victim was his girlfriend's mother, J.; the victims of the remaining charges were B., Gant's girlfriend, and T., a friend of Gant's son. Gant appealed, challenging the sufficiency of the evidence to support the first-degree murder conviction and one of the attempted murder convictions and the propriety of the first-degree-murder instruction. This court affirmed the convictions and the sentences imposed. *State v. Gant*, No. 2 CA-CR 2002-0274 (memorandum decision filed Sept. 30, 2003). Gant then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., claiming in his initial petition that his various trial attorneys had been ineffective because each new attorney appointed had not had sufficient time to prepare the case. He also contended attorney Robin Puchek, who tried the case, had been appointed just before trial and was not sufficiently prepared to proceed. Gant asserted none of his attorneys had adequately prepared the case for trial and that, if they had "spent some time" with him, they would have learned that he had intended to claim self-defense. Gant argued Puchek should have elicited testimony from his brother Robert Gant, who had been present a few weeks before the shooting when T. had threatened to "blast" Gant. He maintained that trial counsel had failed to examine Robert properly by eliciting from him testimony in support of Gant's defense and that the only information Puchek had elicited from Robert was that Gant was a good person. In addition, Gant asserted the jury was guilty of misconduct.

¶3 In a brief minute entry, the trial court dismissed Gant’s petition in November 2004, finding Gant had failed to raise a meritorious, colorable claim for relief. In March 2007, having previously granted Gant multiple extensions of time for filing a petition for review to this court, the trial court granted another request for such an extension and a request for leave to file a supplement to the petition for post-conviction relief. Thereafter, Gant filed a supplemental petition, attaching to it the transcript of a telephonic interview of Gant’s other brother, Ronnie Gant. Ronnie stated that he had been present during the shooting; T. had had a gun in his pants and stood up and tried to pull it out before Gant started shooting. Gant asserted Ronnie would have testified that Gant had shot B. and her mother J. accidentally while defending himself against T. The court denied Gant’s supplemental request for post-conviction relief in another brief minute entry, finding Gant had not raised “a colorable claim upon which relief can be granted and has further failed to demonstrate that he is entitled to a hearing on the issues raised.” The petition for review challenging the denial of relief in both orders followed.

¶4 Gant has not established on review that the trial court abused its discretion when it denied relief on his claim of jury misconduct. For the first time, Gant contends on review that “[t]his issue should have been presented to the Court of Appeals for review, and failure to do so was error on the part of trial and appellate counsel.” But Gant did not present a claim of ineffective assistance of appellate counsel to the trial court. Instead, relying on *State v. Garcia*, 141 Ariz. 580, 688 P.2d 206 (App. 1984), he asserted only the underlying claim, arguing that he had preserved it by bringing the matter to the attention of

the trial court and that claims of jury misconduct may be raised after a trial has concluded. But Gant fails to recognize the implications of Rule 32.2, Ariz. R. Crim. P. The claim of jury misconduct could have been raised on appeal; because it was not, it is therefore waived, and Gant was precluded from raising it in this post-conviction proceeding. Ariz. R. Crim. P. 32.2(a)(3). Nor will we address a claim raised for the first time on review such as Gant's cursory claim of ineffective assistance of appellate counsel. *See generally* Ariz. R. Crim. P. 32.9. The summary denial of relief on this ground was proper.

¶5 We now turn to Gant's claim of ineffective assistance of trial counsel. To state a colorable ineffective assistance claim, a defendant must establish counsel's performance fell below objective standards of reasonableness and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). A colorable claim warranting an evidentiary hearing is "one that, if the allegations are true, might have changed the outcome." *State v. Runnigeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). Although "certain basic decisions have come to belong to an accused," such as "[t]he ultimate decisions on whether to plead guilty, whether to waive jury trial, and whether to testify," tactical or strategic decisions about how to conduct the trial, including which witnesses to call to testify, "rest[] with counsel." *See State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984).

¶6 Having presided over the trial, the trial court is in the best position to assess the effect any deficient performance may have had on the jury, *see State v. Gerlaugh*, 144 Ariz. 449, 458, 698 P.2d 694, 703 (1985), and, in this case, whether the outcome might

have been different if defense counsel had questioned Robert further or called Ronnie to testify on Gant's behalf. Based on the record before us, we cannot say the court abused its discretion in rejecting the claim based on counsel's failure to elicit testimony from Robert.

¶7 In his initial petition, Gant simply stated that none of his attorneys had determined Robert was present when T. threatened Gant a few weeks before the shooting and, therefore, Puchek had not asked Robert about the incident. Gant asserted in the petition that he "had urged his counsel to contact his brother, Robert Gant," but provided no support for that assertion. Gant failed to cite to the record, and he did not support his factual allegations with his own affidavit or an affidavit from Robert or anyone else establishing that Robert had been present when the threat was made and what Robert would have stated had he been asked about this at trial. *See* Ariz. R. Crim. P. 32.5 (defendant shall include in petition every known ground for relief, and "[f]acts within the defendant's personal knowledge shall be noted separately from other allegations of fact and shall be under oath"; defendant is required to cite record and provide legal support for claims). Gant did, however, "swear" the contents of the petition were true. To the extent that verification served the same purpose as an affidavit and thereby satisfied the requirement of Rule 32.5, Gant nevertheless failed to provide an affidavit from Robert, avowing what his testimony would have been had he been asked. Gant did not raise a colorable claim and has not sustained his burden on review of establishing the trial court abused its discretion by so finding.

¶8 Nor has Gant established the trial court abused its discretion in summarily denying relief on the claim of ineffective assistance of counsel that he raised in the supplemental petition for post-conviction relief. In the supplement, Gant asserted that, after the court dismissed the initial petition, he “discovered the identity of the witness his trial counsel should have called to testify at Defendant’s trial. Ronnie Gant, the Defendant’s brother, was present when the events leading up to the shooting unfolded.” Gant maintained that Ronnie would have supported Gant’s contention that he had shot T. in self defense and that, in the course of defending himself against T., he accidentally had shot J.

¶9 Gant’s supplemental petition is based on statements Ronnie made during a telephonic interview with an investigator for defense counsel, which was transcribed. The transcription was attached to the supplemental petition, and Ronnie subsequently verified the statements he had made. In what appears to be a statement inconsistent with Gant’s assertion that he had just “discovered the identity” of the witness defense counsel should have called to testify, Gant asserted in the supplemental petition that “trial counsel [had] failed to call Ronnie Gant despite Defendant’s repeated requests that counsel do so.” Gant provided no support for this statement. Again he did not submit his own affidavit. Moreover, unlike the initial petition, the supplemental petition was not verified by Gant; rather, it was signed by appointed counsel. During his interview, however, Ronnie stated that, although he had never spoken to the police about the shooting, he had talked to the attorney who represented Gant at trial, presumably Puchek.

¶10 Because of the brevity of the trial court’s order, we cannot determine the basis for its denial of relief on this claim. In its response to the supplemental petition, the state suggested Puchek had made a tactical decision not to call Ronnie as a witness. The state argued Ronnie’s version of the events did not support Gant’s claim of self defense, so that trial counsel would not have wanted to call him as a witness. The state noted Ronnie had stated that T. had been running away from Gant when Gant shot him.<sup>1</sup> In its response to the petition for review, the state again asserts that Ronnie’s statement “does not support Petitioner’s claim of self-defense.” Thus, the state contends, “assuming that Ronnie was at the scene, that trial counsel was aware of his testimony, and that he was available for testimony, trial counsel had good reason to refuse to call him as a witness.” We have no basis for finding the trial court abused its discretion in implicitly agreeing with that contention.

¶11 “[T]he power to decide questions of trial strategy and tactics,’ including what witnesses to call at trial, ‘rests with counsel.’” *State v. Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d 945, 954 (App. 2007), *quoting Lee*, 142 Ariz. at 215, 689 P.2d at 158. Indeed, there is a presumption “that the challenged action was sound trial strategy under the circumstances.” *State v. Stone*, 151 Ariz. 455, 461, 728 P.2d 674, 680 (App. 1986). Counsel must be given ““wide latitude . . . in making tactical decisions.”” *Nash*, 143 Ariz.

---

<sup>1</sup>In the response to the petition for review that the state filed pursuant to this court’s order, it argues instead that Gant “offered no proof that trial counsel had access to this information or that he ever knew of, or met with, Ronnie Gant.” But, if believed, Ronnie’s statement that he had talked to counsel served as such proof.

at 398, 694 P.2d at 228, *quoting Strickland*, 466 U.S. at 689. Thus, “[d]isagreements as to trial strategy or errors in trial [tactics] will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis.” *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984).

¶12 Assuming the trial court believed that Puchek and Ronnie Gant had spoken before trial, the court readily could have found Puchek had made a reasonable tactical decision not to call Ronnie to testify. *See State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987) (“disagreements in trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct has some reasoned basis”). Given the problematic portions of Ronnie’s statement discussed above, the fact that Ronnie’s version of the events conflicted with the testimony of Gant’s son, the compelling evidence presented at trial depicting Gant as the aggressor, and the “strong presumption of effective assistance,” *State v. Henry*, 176 Ariz. 569, 585, 863 P.2d 861, 877 (1993), we cannot say the trial court abused its discretion by denying relief.

¶13 Similarly, even assuming counsel performed deficiently by failing to call Ronnie as a witness, Gant has not established there is a “reasonable probability that, but for counsel’s unprofessional error[], the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Gant testified that he knew T. often carried a weapon and that he thought T. had a gun. Gant’s son testified that, although he did not know whether T. had had a gun, T. had moved toward Gant. But Gant’s son also testified about his constant



physical struggle with his father throughout this episode and his efforts to stop Gant from shooting him or someone else after Gant had shot T. And, as we previously noted, notwithstanding Ronnie's statement that he saw T. had a gun, portions of his statement do not support Gant's claim of self defense as to T. and provided little if any exculpatory value with respect to the charges of murder of J. and attempted murder of B.

¶14 Additionally, "[t]he trial court's decision is entitled to significant deference because the judge was present at trial and can better evaluate the cogency of the evidence and assess the relationship between counsel's allegedly defective performance and the verdict." *Stone*, 151 Ariz. at 459, 728 P.2d at 678. Once again, given the evidence establishing Gant had been the aggressor and continued to pursue T. after shooting him, Gant has failed to establish the outcome probably would have been different had Ronnie testified in accordance with his telephonic statement. Thus, the trial court did not abuse its discretion by denying relief on this claim.

¶15 Gant's petition for review is granted. For the reasons stated, we deny relief.

---

JOHN PELANDER, Chief Judge

CONCURRING:

---

JOSEPH W. HOWARD, Presiding Judge

---

J. WILLIAM BRAMMER, JR., Judge